LIBRARY
SUPREME COURT, U. S.

No. 113

Office-Supreme Court, U.S.
FILED
NOV 7 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

JOHN T. CHADWELL
GLENN W. McGEE
JEAN ENGSTROM
ALLAN J. RENICHE
135 South La Salle Street
Chicago 3, Illinois

JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota

ROBERT Z. HICKMAN
First National Bank Building
Danville, Illinois

Attorneys for Respondent

Of Counsel:
CHADWELL, KECK, KAYSER, RUGGLES & McLAREN
135 South La Salle Street
Chicago 3, Illinois

McCORMICK AND HENDERSON, INC., CHICAGO

INDEX

	PAGE
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATUTE AND RULE INVOLVED	2
STATEMENT	3
A. The Indictment	3
B. The Motion to Transfer	4
1. Preliminary Proceedings	4
2. The Introduction of The Fair Trial Issue	5
3. The Sworn, Documentary Evidence Produced by Defendant	7
Location of parties and records	8
Events in issue	8
Disruption of business and unjustifiable expense	9
Convenience of witnesses	10
Docket conditions	10
4. The Government's Answering Avowals	11
C. Petitioner's Decision Denying Transfer	12
D. Petition for Writ of Mandamus and Answer to the Rule to Show Cause	15
E. The Opinion of the Court of Appeals	16
F. The Petition for Certiorari and Petitioner's Brief on the Merits	17
SUMMARY OF ARGUMENT	18
ARGUMENT	22
I. The All Writs Act Gives the Courts of Appeals Discretionary Power to Remedy Abuses or Usurpations of Power Perpetrated in the Application of Criminal Rule 21(b)	23

PAGE

II. Petitioner Usurped the Power of a Sister Court When, Citing Facts True of Any Substantial Corporate Defendant in its Home District, He Denied Transfer Because the Government Might Not Obtain a Fair Trial 28

A. Petitioner usurped the power of a sister court when he presumed to appraise or speculate on the efficacy of its operation and its ability to provide a fair trial 29

B. Petitioner abused his discretion when he refused to give any weight to the "constitutional concern" that those accused of crime be tried, when possible, at home 35

III. The Appellate Court's Order That This Case be Transferred Forthwith Was Proper in the Light of the Record Facts 42

A. It was proper, and necessary, for the court of appeals to review the whole record 42

B. The record so overwhelmingly shows that transfer will be in the interest of justice as to compel transfer under Rule 21(b) as a matter of law 46

CONCLUSION 54

CITATIONS

CASES

A. C. Nielsen Co. v. *Hoffman*, 270 F.2d 693 (7th Cir. 1959) 26

Atlass v. *Miner*, 265 F.2d 312 (7th Cir. 1959), *aff'd* 363 U.S. 641 (1960) 26

Bankers Life and Cas. Co. v. *Holland*, 346 U.S. 379 (1953) 24

Beck v. *Washington*, 369 U.S. 541 (1962) 30

Blumenfield v. *United States*, 284 F.2d 46 (8th Cir. 1960), *cert. denied* 365 U.S. 812 (1961) 30

PAGE

Carbide & Carbon Chem. Corp. v. *United States Industrial Chem., Inc.*, 140 F.2d 47 (4th Cir. 1944) 30

Chicago, R.I. & Pac. R.R. v. *Igoe*, 212 F.2d 378 (7th Cir. 1954) 30, 43

Chicago, R.I. & Pac. R.R. v. *Igoe*, 220 F.2d 299 (7th Cir.), *cert. denied* 350 U.S. 822 (1955) 44, 45

DiBella v. *United States*, 369 U.S. 121 (1962) 18, 27

Early & Daniel Co. v. *Wedgefield, Inc.*, 164 F. Supp. 414 (M.D.N.C. 1958) 30

Ex parte Crane, 30 U.S. (5 Pet.) 190 (1831) 23

Ex parte Fahey, 332 U.S. 258 (1947) 24, 43

Exmoor Country Club v. *United States*, 119 F.2d 961 (7th Cir. 1941) 45

Hyde v. *Shine*, 199 U.S. 62 (1905) 38

Hyde v. *United States*, 225 U.S. 347 (1912) 38

In re Palliser, 136 U.S. 257 (1890) 35

Irvin v. *Dowd*, 366 U.S. 717 (1961) 30

Johnson v. *Mathews*, 182 F.2d 677 (D.C. Cir.), *cert. denied* 340 U.S. 828 (1950) 30

Johnston v. *United States*, 351 U.S. 215 (1956) 35, 36

Krulewitch v. *United States*, 336 U.S. 440 (1949) 38

LaBuy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 18, 23, 24, 26

Los Angeles Brush Mfg. Corp. v. *James*, 272 U.S. 701 (1927) 18, 23, 24

Lummus Co. v. *Commonwealth Oil Ref. Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962) 42, 43

McCullough v. *Cosgrave*, 309 U.S. 634 (1940) 24

Nelson v. *Montgomery Ward Co.*, 312 U.S. 373 (1941) 45

Patterson v. *Louisville & N.R.R.*, 182 F. Supp. 95 (S.D. Ind. 1960) 30

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 26, 28

Sypert v. *Miner*, 266 F.2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959) 26

PAGE

United States v. *American Natural Gas Co.*, 1959 Trade Cas. ¶ 69,265 (E.D. Wis. 1959) 49, 50

United States v. *Cashin*, 281 F.2d 669 (2d Cir. 1960) 29, 39

United States v. *Cores*, 356 U.S. 405 (1958) 19, 23, 24, 36, 40, 41

United States v. *Erie Basin Metal Prods. Co.*, 79 F. Supp. 880 (D. Md. 1948) 5, 39

United States v. *General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1961) 39, 50

United States v. *Gerber*, 86 F. Supp. 175 (E.D. Pa. 1949) 51

United States v. *Hoffa*, 205 F. Supp. 710 (S.D. Fla., 1962) 13, 31

United States v. *Johnson*, 323 U.S. 273 (1944) 18, 19, 28, 29, 38, 39

United States v. *Johnson*, 327 U.S. 106 (1946) 45

United States v. *Kline*, 205 F. Supp. 637 (D. Minn. 1962) 30

United States v. *National City Lines, Inc.*, 7 F.R.D. 393 (S.D. Cal. 1947) 25, 29, 39, 48, 50, 53

United States v. *North Am. Van Lines, Inc.*, 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962) 39

United States v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960) 39, 47

United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 45

United States v. *White*, 95 F. Supp. 544 (D. Neb. 1951) 52

Van Dusen v. *Barrack*, Supreme Court Dkt. No. 80, October Term 1963 (pending) 27

TEXTS

4 Barron, Federal Practice and Procedure, § 2091 (1951) 40

Blume, *The Place of Trial of Criminal Cases*, 43 Mich. L. Rev. 59 (1944) 37

PAGE

Federal Rules of Criminal Procedure, New York University School of Law Institute, Proceedings (1946) 40, 49

Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445 (1944) 40

2 Story, Commentaries on the Constitution, § 1781 (4th ed. 1873) 37

STATUTES

All Writs Act, 28 U.S.C. § 1651(a) 2, 18, 26, 27

Interlocutory Appeals Act, 28 U.S.C. § 1292(b) 27

MISCELLANEOUS

Brief for the Government in *United States* v. *Cores*, Docket No. 455, Oct. Term 1957, p. 21 41

Federal Rules of Criminal Procedure

Rule 2 25

Rule 21(b) 1, 2, 3, 18, 19, 21, 22, 23, 24, 29, 35, 39, 40, 41, 45, 46, 49, 50, 51, 53

Supreme Court Rule 40-1(d)(2) 18, 25, 34

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 113

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals ordering petitioner to transfer this case to the District of Minnesota pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure is reported at 314 F.2d 369 (R. 238-254). Petitioner's Memorandum and Order in the district court denying respond-

ent's motion to transfer, entered August 31, 1962, is reported unofficially in 1962 Trade Cas. ¶ 70,455 (E.D. Ill. 1962) (R. 219-227).[1]

QUESTIONS PRESENTED

1. Did the court of appeals abuse the discretion granted it under the All Writs Act when it ordered petitioner to allow defendant's transfer motion on this record where (a) petitioner's denial of the motion was based on a concededly improper consideration constituting an abuse of the discretion vested in him under Rule 21(b), (b) the uncontested record facts demonstrate that allowance of defendant's motion to transfer is in the interest of justice, and (c) petitioner had fully considered the relevant and uncontested record facts and had found in them no basis for denial of the motion to transfer.

2. In considering the interest of justice under Criminal Rule 21(b), what weight should be given to the fact that the proposed transferee district is the home district of the defendant in a case in which there is no substantial reason for trial in the district where the indictment was returned.

STATUTE AND RULE INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or ap-

[1] Throughout this brief, the petitioner, Chief Judge Platt, is identified as "petitioner" and the respondent, Minnesota Mining and Manufacturing Company, as "defendant". References to the Petition for Certiorari are designated "Pet." and to petitioner's brief on the merits, "P. B." Emphasis in quotations is added.

propriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

STATEMENT

A. THE INDICTMENT.

The nine-count indictment was returned on December 13, 1961, by a grand jury sitting in Danville, a city with a population of about 40,000 located in central Illinois, roughly midway between Chicago and St. Louis,[2] in the Eastern District of Illinois (R. 2). It charges, under Sections 1 and 2 of the Sherman Act, that the defendant, Minnesota Mining and Manufacturing Company, which has its home offices in St. Paul, Minnesota, has attempted to monopolize and engaged in a combination and conspiracy in restraint of, and conspired to monopolize, interstate and foreign commerce in pressure sensitive tapes since 1931 (Counts 1, 2, 3), in mag-

[2] The record shows Danville to be between 130 and 190 miles south of Chicago, depending on the starting point in Chicago (R. 174, 176), and Rand McNally's Road Atlas indicates a distance of about 190 miles between Danville and St. Louis.

netic recording media since 1946 (Counts 4, 5, 6), and in aluminum presensitized lithographic plates since 1950 (Counts 7, 8, 9). Although the paragraphs of the indictment dealing with "Jurisdiction and Venue" (R. 8, 14, 20) allege generally that the offenses complained of were carried out in part within the Eastern District of Illinois, the indictment does not charge that any specific act complained of took place anywhere within that district.

B. THE MOTION TO TRANSFER.

1. Preliminary Proceedings.

Defendant attempted, first informally (R. 24-29), and then by motion for a bill of particulars (R. 32-37), to obtain information necessary to determine (1) whether venue existed in the Eastern District of Illinois and (2) whether a jurisdictional basis existed for filing a motion to transfer to its home district, the District of Minnesota, or failing that, to Chicago in the Northern District of Illinois. The government would stipulate only that venue would lie in those districts (R. 30). Petitioner denied defendant's motion for bill of particulars (R. 38).

Defendant then filed, on March 12, 1962, a motion to transfer this case to the District of Minnesota supported by nine affidavits (R. 41-85) of defendant's officers and counsel covering these subjects: the location of the defendant; the location of every prospective witness known to defendant on both sides of the case; the place where the events constituting the alleged crime took place; the location of the documents and records involved; the extensive and

serious disruption of defendant's business that would result from trying the case in Danville rather than in defendant's home district and the great added expense of a Danville trial to defendant; the location of counsel; the relative accessibility of the two proposed forums for witnesses known to be coming from other parts of the country; and the docket condition in each district. The government, on April 1, 1962, filed two affidavits (R. 86-110) of its trial attorneys, one relating to docket conditions and one containing the general averments about defendant's wealth and asserted guilt and the alleged convenience of an undisclosed number of unidentified witnesses, set forth at P.B. 6-7.

2. The Introduction of The Fair Trial Issue.

Nowhere, either in the defendant's affidavits or the government's, was there any suggestion that the government, or the defendant, might not receive a fair trial in either forum. At the hearing on the motion on June 14, 1962, defendant's counsel directed petitioner's attention to *United States* v. *Erie Basin Metal Prods. Co.*, 79 F. Supp. 880, 885 (D. Md. 1948), which lists among several factors relevant to a determination of the interest of justice in a transfer situation, "the promotion of a *speedy* and at the same time a fair trial. . . ." (R. 127). Before counsel could explain the relevance of this quotation to the docket conditions in the two proposed forums, petitioner interrupted with a series of questions about the number of defendant's stockholders, employees, and executives in St. Paul, finally explaining, "What I am referring to is obtaining a jury up there [in St. Paul], *an impartial jury*" (R. 128). Defendant's counsel

pointed out that no such problem could arise in a community of more than a million, especially as stockholders and employees called for jury duty would certainly be challenged for cause. But, petitioner persisted, "there are *fellow sympathizers* with [defendant] . . . there . . . [and defendant has] been located there for a good many years . . . [and] no doubt the officers and directors have been very active in various civic organizations up there and in that way . . . have built up a favorable attitude toward the corporation, and *it might have an effect upon a jury*. . . . I think those are things that ought to be considered . . ." (R. 128-130). Counsel for defendant pointed out that such facts had not been considered in any of the decided cases and that defendant, like other corporations and people, had probably made as many enemies as friends, but he offered to give petitioner whatever information he wanted (R. 129-130).

Close to the beginning of his answering argument, government counsel noted that the "court [had] raised a very important question" and assured petitioner that the government could "prove out of the mouth of a witness . . . that . . . the Government, will not get a fair and impartial trial in St. Paul" (R. 135). This "proof" he provided by reading an excerpt from page 6856 of the grand jury transcript which dealt with defendant's decision to test, outside the Twin Cities (R. 178), a new product, the Jewett plate used only by printers (R. 203). On the basis of this excerpt, taken from a transcript that defendant and its counsel have never seen, government counsel declaimed, "I am . . . interested in the Government receiving a fair and impartial trial

for the Government, and . . . *I challenge where any court would decide that the Government can get a fair trial in Minneapolis or St. Paul*" (R. 178). "I know [that] in this district [Danville] both . . . will get a fair trial. I know the Government won't in Minneapolis or St. Paul" (R. 179).

Counsel for defendant thereafter filed the information petitioner requested (R. 128, 180, 187-191, 197-198) establishing that employees or stockholders of defendant numbered less than 1% of the total population of 3,413,684 from which juries may be drawn in the Minnesota district and less than 2% of the population of 1,619,019 in the divisions in which the trial would probably be held, and that in the metropolitan Twin Cities area, employees of the United States Government outnumbered defendant's (R. 191).

At the continued oral argument on August 21, 1962 (R. 192), government counsel reiterated that the government could not "get a fair trial" (R. 194) or "a fair and impartial trial" (R. 197) in Minnesota and presented unverified information about defendant's charitable contributions and the participation by its officers, directors, and employees in civic and other organizations in the Twin Cities (R. 194-195, 205).

3. The Sworn, Documentary Evidence Produced by Defendant.

The affidavits that defendant filed in the district court in support of its motion to transfer to Minnesota, admitted or standing uncontroverted in the record, establish the following:

Location of parties and records. Defendant's home offices, general and administrative, its main research laboratories, and several of its manufacturing plants are located in St. Paul, Minnesota. Defendant has no facilities, not even a branch sales office, in the Eastern District of Illinois (R. 42, 46, 60). All but two of defendant's eleven directors and twenty-nine corporate officers, live in or near St. Paul, Minnesota; none lives in the Eastern District of Illinois (R. 41-42). Trial counsel on both sides are in Chicago (R. 42, 76), but defendant's general counsel and patent counsel, who have served defendant for many years (from 1937 and 1929 respectively), are located in St. Paul (R. 41, 42, 66). Beside its copies of the 15,000 documents already furnished the government, defendant's general corporate files (4,000 file drawers), its operating division files (over 300 drawers), and its patent attorney's files (15 cabinets) are all located in St. Paul (R. 71-72). Eleven alleged co-conspirator corporations are located on the East Coast or in the Chicago area (R. 8, 14-15, 20-21).

Events in issue. "In the main, the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements . . ." (R. 222). No patent licensee, no alleged co-conspirator, no direct competitor is located within the Eastern District of Illinois (R. 48, 63, 67-68, 77-78). Defendant's executives in charge of the products, patents, patent licenses and negotiations involved in the indictment know of no event relating to these matters that took place and no prospective witness who lives in the Eastern District of Illinois (R. 47, 48, 51, 55, 59, 63,

77). Such events have on many occasions taken place in St. Paul (R. 48, 51, 55, 59, 63) and decisions concerning such matters have been made in St. Paul where defendant's home offices and patent counsel are located (R. 66).

Disruption of business and unjustifiable expense. In order adequately to defend against the charges of this indictment, it is essential that some of defendant's principal executives, who work and live in the Twin Cities area, be present at the place of trial throughout the time of final preparation for, and actual trial of, this case, both because of their knowledge of the product lines and the patent licenses involved in the indictment (R. 44-45) and because many of them will be important defense witnesses (R. 47, 79). Similarly, the presence of subordinates who have had responsibility in the areas covered by the indictment and who also live in or near St. Paul will be necessary at the trial both in advisory and testimonial capacities (R. 55-56, 60, 64). General and patent counsel from St. Paul will have to be present before and during the trial (R. 43-46), and contact between corporate executives and all counsel will be easier, less expensive, less disruptive of defendant's business, and more apt to assure defendant adequate representation if the trial is held in St. Paul (R. 46-47, 52, 56, 60, 64). Moreover, the removal of personnel and records to Danville necessary to an adequate defense would cause serious disruption of defendant's normal business activity at all levels (R. 55-56, 60, 64, 71-73).

The cost to defendant of trial in Danville instead of St. Paul, not including transportation, facilities for witnesses,

office space for executives and compensation of local counsel, will exceed $100,000 (R. 47, 75).

Convenience of witnesses. Defendant's affidavits show the names and locations of all known prospective witnesses: those named as co-conspirators, its own witnesses, and the witnesses who testified before the grand jury (R. 76-78). None can be found within the Eastern District of Illinois (R. 77). Those who live outside the Twin Cities area are almost all located on the East Coast (New York, Boston, Philadelphia, etc.) or in Chicago (R. 8, 14-15, 20-21, 48, 77-78). Accordingly, one of defendant's affidavits details the train and plane schedules between New York and Chicago and the two proposed forums (R. 76-85). Danville must be reached through Chicago (R. 78), but only three planes and three trains reach Danville daily from Chicago, and the schedules are such that it would be necessary for anyone who had to attend a morning session to arrive in Danville the night before (R. 84). On the other hand, the Twin Cities Airport is served by seven airlines with more than 100 daily flights, 36 from Chicago. There are 18 flights daily between New York and the Twin Cities and 40 non-stop flights daily between New York and Chicago (R. 78). A witness or other interested person leaving Chicago at 8:00 a.m. can arrive in St. Paul at 9:05 a.m. in time to attend a morning court session (R. 82-85).

Docket conditions. The dockets of the District Court of Minnesota are current (R. 48). The case load in the Dis-

trict of Minnesota on June 30, 1961 was 141.5 cases per judge (R. 80); on July 31, 1962, it was 134 cases per judge (R. 186). In the Eastern District of Illinois on June 30, 1961, the case load was 163.5 per judge (R. 80).

4. The Government's Answering Avowals.

In answer to defendant's sworn evidence, the government filed two affidavits of its attorneys (R. 86-110), one entirely about dockets[3] and the other containing the unsubstantiated assertion that some of the government's witnesses, whose names and locations were not disclosed, would find it more convenient to get to Danville than St. Paul (R. 89). The second affidavit also contained assertions, as set forth at P.B. 6-7, about patent suits in which defendant had previously participated outside the Twin Cities area, defendant's income and assets, and the continuance of as yet unproved illegal activity (see pp. 50-53, *infra*). At the oral argument, government counsel, with petitioner's permission (R. 137, 178), discussed at length the evidence purportedly presented to the grand jury covering the 30-year period involved in the indictment (R. 137-163). Nowhere in this extensive argument is there any suggestion that any event material to proof of the crimes alleged in the indict-

---

[3] The government's affidavit does not contradict defendant's affidavits (pp. 10-11, *supra*) on this point, but shows that on February 28, 1962, petitioner's calendar included 92 cases originally brought in his division and 17 cases transferred to it from the other division of the district (R. 109-110).

ment took place in the Eastern District of Illinois[4] or that *any* prospectfve government witness is located in the Eastern District of Illinois.

C. PETITIONER'S DECISION DENYING TRANSFER.

On August 31, 1962, petitioner entered his memorandum and order denying defendant's motion to transfer. He found it "material in determining where the cause should be tried" that "it would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" on the following rationale (R. 226-227):

> "For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stock-

[4] The government did assert at oral argument that it will be able to establish venue in the Eastern District of Illinois although it did not suggest how for the counts involving one of the three disputed product lines; on the other two product lines the government pointed to two letters (dated 1953 and 1958) that refer to customers located in the Eastern District of Illinois (R. 154-155) and defendant's appearance as an involuntary party plaintiff in one patent suit brought in East St. Louis (R. 66-67, 159). Defendant stipulated venue in the Eastern District of Illinois for purposes of the transfer motion only; defendant could not move to dismiss, as petitioner suggests it should have done (see P.B.33), because petitioner denied defendant access to the facts that would be needed to support such a motion (see p. 4, *supra*).

holders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. . . . See United States v. Hoffa, D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722."

Petitioner discussed the record created by the affidavits factor by factor, but none of these considerations provided a salient reason for denial of transfer. With respect to the events in issue, petitioner wrote that "it is difficult . . . to determine without the disclosure of evidence . . ." where they took place but that "the defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (R. 222-223).

With respect to convenience and hardship, he recorded that the District of Minnesota is the "home District of the defendant" (R. 224) where its "principal place of business . . . its main research laboratory and several manufacturing

plants . . ." are located (R. 231); that the interested attorneys are located in Chicago and St. Paul (R. 224); that "witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred . . ., but as to other witnesses, the question of inconvenience is not so easily determined" (R. 222); that defendant's personnel and witnesses coming from St. Paul can get to Danville "by automobile in about twelve hours . . ." (R. 225) and "defendant also operates its own planes" (R. 226); that "there are direct air flights from New York to Minneapolis-St. Paul [which] . . . might accommodate the witnesses from . . . New York . . ." (R. 224-225) and "more rail and air connections between Chicago and St. Paul than between Danville and Chicago . . . [but] Danville can be easily reached from Chicago . . . by automobile, air, or train . . ." (R. 224); that the "trial" and "transporting [of] its officers and employees as witnesses" would "be more expensive to the defendant . . ." in the Eastern District of Illinois but "witness fees to be paid by the Government would be less . . . in Danville . . ." (R. 224); that "there can be little doubt that . . . trial . . . in St. Paul . . . would . . . [entail] less disruption of defendant's business . . . but when consideration is given to the size of defendant's operations, the number of its plants, and their locations, the interruption of defendant's business should not be too great" (R. 223-224); that "it would be an inconvenience for the defendant to locate and transport the necessary documents" to Danville, but that if transfer were granted, the government would have to move nine corrugated file boxes to Minnesota (R. 223).

With respect to dockets, petitioner stated that "without a doubt" this case could be tried at an earlier date in Danville because at the time there were "but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20" (R. 226).

D. PETITION FOR WRIT OF MANDAMUS AND ANSWER TO THE RULE TO SHOW CAUSE.

On September 15, 1962, defendant filed its petition for writ of mandamus, with supporting brief, in the Court of Appeals for the Seventh Circuit (R. 228). In petitioner's answer to the rule to show cause and his supporting brief, filed on November 1, 1962 (R. 234), petitioner defended his consideration of the "fair trial" factor—"that it would be more difficult for the Government to obtain an impartial jury in . . . Minnesota . . ."—and also urged that the remainder of the record justified denial of transfer (R. 234-236).

With respect to defendant's overwhelming showing that transfer would be in the interest of justice, petitioner said that it did not appear to him that defendant's "every assertion must be taken at face value . . ." because the inconvenience of trial in Danville could be reduced by the use of long distance telephone and defendant's private planes and, moreover, defendant "was temporarily willing to assume all such inconvenience and expense just to have the trial in Chicago"[5] (R. 237).

---

[5] Nothing in the record supports this reference to Chicago. Defendant did ask for venue information about the Northern District of Illinois, which includes Chicago, at the same time that it asked about the District of Minnesota (see p. 4, *supra*) but having obtained the government's stipulation that venue would lie in both of those districts, defendant filed its motion to transfer to Minnesota.

E. THE OPINION OF THE COURT OF APPEALS.

On February 27, 1963, the court of appeals issued a writ of mandamus ordering the case to be transferred to the District of Minnesota (R. 238, 255). The court of appeals viewed petitioner's assertion that it would be difficult to get "a fair and impartial jury in the Minnesota District" to be the "most important item" in his decision to deny transfer (R. 240, n. 1) and found that "the only meaningful purpose which can be attributed to the language used is that the court believed that there was a *likelihood* of the government not receiving a fair jury trial in Minnesota" (R. 243-244) which amounted to speculation about "the efficacy of the operations of a federal court of concurrent jurisdiction in another district. . ." (R. 247). The court ruled that "no order in any way based upon such reasoning can stand, even under the guise of an exercise of discretion" (R. 247).

The "fair trial" consideration had become determinative, the court found in the context of a record which demonstrated, "by proof or admission . . . the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." (R. 248):

> "A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to [defendant] of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the [defendant's] executives and its trial attorneys in connection with protracted antitrust prosecution trial.

> "[Defendant] has no office, plant or other facility in the Eastern District of Illinois.
>
> "There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

Petitioner had, moreover, "ignored" the "underlying spirit of the constitutional concern" that "a defendant . . . [in a criminal case] be prosecuted [if possible] in its own environment or district . . ." (R. 243, 248). Accordingly, the court of appeals issued its "writ of mandamus directed to [petitioner] . . . ordering him to transfer [this criminal action] . . . to the District of Minnesota" (R. 248).[6]

F. THE PETITION FOR CERTIORARI AND PETITIONER'S BRIEF ON THE MERITS.

In his petition for writ of certiorari to this Court, filed April 29, 1963, petitioner expressly denied that he sought "review of the correctness of the Seventh Circuit's holding that it was impermissible to take into account the difficulty of assembling an unbiased jury" in the proposed transferee court (Pet. 12, n. 2). He conceded that his decision merited

---

[6] Chief Judge Hastings, dissenting, agreed that no order based on speculation about the ability of a sister court to provide a fair trial should stand, but asserted, without any explanation, that he did not believe that petitioner had done so (R. 252); he also suggested that, as petitioner claimed his decision to have been based on the whole record, the proper procedure would have been to issue a writ remanding the case to petitioner for a decision based on the record exclusive of the improper "fair trial" factor (R. 253-254).

the court of appeals' issuance of a writ of mandamus, and he asked review only of its terms (Pet. 2; see also Pet. 13; P.B. 2).

In his brief on the merits to the Court filed October 1, 1963, when these questions were already barred by the Court's Rule 40-1(d)(2), petitioner has urged that his decision on fair trial might have been misunderstood by the court of appeals and the error might have been less serious than he had conceded it to be (P.B. 18-19, 28-29). He has also raised a belated question as to the existence of power in the court of appeals to compel the result dictated by the interest of justice on this record (P.B. 17).

SUMMARY OF ARGUMENT

To allow petitioner's decision here to stand would be, as the appellate court recognized, to repeal Criminal Rule 21(b).

I. The Court has made it clear that appellate courts can and should exercise the discretion given them in the All Writs Act to exert a proper and necessary "supervisory control" over the district courts (*LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957)) in cases involving, as this case does, abuses and usurpations of power in the application of a procedural rule "which by law it is the duty of this Court to formulate and put in force" (*Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706 (1927)) where "no other remedy will suffice." *DiBella* v. *United States*, 369 U.S. 121, 125, n. 4 (1962). The availability of other remedies in *civil* cases cannot affect the power and duty of the appel-

late courts to use the writ to prevent otherwise irremediable usurpations of power in the application of a *criminal* rule touching "closely the fair administration of criminal justice and public confidence in it. . . ." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

II. A. The petition for certiorari conceded that the credence petitioner gave to the unsubstantiated claim that the government could not obtain a fair trial in the proposed transferee court warranted, in itself, the use of the extraordinary writ of mandamus. The court of appeals held, on the basis of settled law, that such speculation about the efficacy of the operations of a court of concurrent jurisdiction constitutes an unlawful appropriation of the power of that court and that no decision "in any way based on such reasoning" should stand. The claim, made for the first time in petitioner's brief on the merits, that the court of appeals misunderstood petitioner's ruling on this point, examined in the light of the history of the issue as shown in the record before this Court, is exposed as wholly unsupportable.

B. Moreover, here the only basis for the claim of probable unfairness in the proposed transferee court is, in effect, that it sits in the home district of the defendant. Petitioner's decision thus directly contravened the "policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence" (*United States* v. *Cores*, 356 U.S. 405, 410 (1958))—a policy given voice in the Declaration of Independence and so foundational to our legal institutions that this Court has termed it a "constitutional policy"

(*United States* v. *Johnson*, 323 U.S. 273, 276 (1944))—and he did so despite the intention that Rule 21(b) would effectuate that policy in multi-venue antitrust cases.

III. A. Petitioner has objected to the appellate court's examination of the record here and claims that, having found abuse in the consideration of the improper "fair trial" issue, the appellate court should then have remanded instead of directing transfer forthwith. But extraordinary writs are not to be vainly or unnecessarily used. Unless the record disclosed that, the "fair trial" factor removed, a different ultimate decision was at least possible, it is doubtful that the appellate court would have been justified in making use of an extraordinary writ, even one merely ordering remand. Indeed, in the arguments before the appellate court petitioner himself urged the record as a whole, all of which was documentary, as support for his ultimate determination that transfer should not have been allowed. The court of appeals was therefore compelled to examine the record in order properly to determine whether even remand would be in order.

B. The court of appeals found on examination a completely one-sided record, one containing no substantial or affirmative reason for retaining the case in the transferor court and replete with compelling reasons for removing the case to the transferee court. Not only is venue admitted in the proposed transferee forum but, so far as the record shows, the acts allegedly constituting the crimes charged in the indictment actually took place there; it is the district in which defendant's home offices are located and

where its operations are centered; key executives, counsel, and large numbers of the prospective witnesses are there and it will also be a more convenient forum for those who are not; transfer to that forum will save defendant a minimum of $100,000 in trial expense and will avoid serious disruption of its normal business activities in the period before and during what must necessarily be a long and extremely complex trial. At the same time the case is one having virtually no connection, other than a still problematical and certainly technical showing of venue, with the district in which the government chose to bring it; the record shows no act contributing materially to proof of the crimes alleged in the indictment which took place there and no prospective witness who can be found there.

Indeed, the uncontroverted facts of this record, as the appellate court found, weigh so overwhelmingly on the side of transfer that the "interest of justice", the essential and sole criterion of Criminal Rule 21(b), requires transfer as a matter of law. Yet petitioner refused to take "at face value" (R. 237) defendant's overwhelming and detailed showing of convenience for all concerned in the transferee forum and, by accepting in its place unsubstantiated assertions based largely on assumptions of guilt and defendant's income and assets, has held defendant to an absolutely insurmountable burden of proof under Rule 21(b).

ARGUMENT

At stake in this criminal case is the right of all who are accused of crime to freedom from abuse of discretion and of power in the denial of transfer under Criminal Rule 21(b). That rule makes it *mandatory* that a district court, on motion of the defendant, transfer a criminal case when venue lies in the proposed transferee forum and transfer will serve the "interest of justice" (*supra*, p. 3). Basic purposes motivating the adoption of the rule were the prevention of abuses inherent in allowing the government an absolute right to choose the forum in multi-venue criminal cases and the implementation in those cases of the public policy favoring trial in the defendant's home district having venue. These purposes have been frustrated by petitioner's decision which, in effect, renders Rule 21(b) unavailable to this defendant.

For petitioner usurped the power of a sister court and abused and refused to exercise the discretion vested in him by Rule 21(b) by speculating on the ability of another federal court to ensure the government an impartial jury; by deeming "irrelevant" the "constitutional concern" favoring trial in the defendant's home district; by ignoring the sworn, detailed, and uncontradicted record evidence and by crediting in its stead unsubstantiated avowals and the advocacy of a presumption of defendant's guilt and of a dual standard that would deny justice on the basis of wealth. Accordingly, although the decision of the court of appeals to issue its writ of mandamus rests as it must on the record-facts, the case is one that has far-reaching implications for

the administration of justice under Rule 21(b). To hold that mandamus is not available to correct abuse of this magnitude would be to sanction the flouting of the rule by the district courts and thus to endanger the rule's continued vitality as a "valuable tool of justice". *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

I.

THE ALL WRITS ACT GIVES THE COURTS OF APPEALS DISCRETIONARY POWER TO REMEDY ABUSES OR USURPATIONS OF POWER PERPETRATED IN THE APPLICATION OF CRIMINAL RULE 21(b).

"[S]upervisory control of the District Courts by the Courts of Appeals", this Court has affirmed, "is necessary to proper judicial administration in the federal system." *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). That "supervisory control," the *LaBuy* opinion made clear, is provided for in "the All Writs Act [which] confers on the Courts of Appeals the discretionary power to issue writs of mandamus in . . . exceptional circumstances. . . ." *Id.* at 260. Inherent in this general power, established from the time of Chief Justice Marshall's opinion in *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 192-194 (1831), is the power to assure the proper and uniform application of rules of this Court. Especially should mandamus be available to correct a clear "abuse of discretion," which concerns " 'the enforcement of the . . . rules which by law it is the duty of this Court to formulate and put in force . . . ' " *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256-260 (1957); *Los Angeles Brush Mfg.*

Corp. v. *James*, 272 U.S. 701, 706 (1927); *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940).[7]

This case involves a refusal to transfer a criminal case under Criminal Rule 21(b) so seriously abusive as to threaten the Rule's continued usefulness as a "valuable tool of justice." *United States* v. *Cores*, 356 U.S. 405, 410 (1958). When a rule has "been practically nullified by a district judge" an appellate court should "not hesitate" to "use its power of mandamus . . . and deal directly with the District Court in requiring it to conform [with the rule] . . ." *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706-707 (1927). Nor was the abuse here limited to an improper exercise of discretion on the basis of the record actually adduced. It included, as will be shown, an arrogation of the power of a sister court—petitioner's presumption that the transferor court could not provide a fair trial—and a refusal to exercise discretion—petitioner's admission that he deemed it "irrelevant" that transfer was asked to defendant's home district (P.B. 31) when a purpose of Rule 21(b) was to make such transfers possible.

Moreover, the abuse here is one for which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947). Even petitioner admits the virtual impossibility of upsetting an unfavorable verdict after trial because of his denial of transfer (P.B. 21). And, whatever the verdict, an appeal after trial can in no way compensate for the

---

[7] *LaBuy* distinguished Bankers Life and Cas. Co. v. Holland, 346 U.S. 379 (1953) on the basis that it "did not concern rules promulgated by this Court but, rather, an Act of Congress . . ." 352 U.S. at 257.

expense and inconvenience of a trial that, in the interest of justice, should have been held elsewhere. It was to obviate unjustifiable expense and inconvenience that the transfer rule was adopted.[8] But a new trial, the only remedy that regular appeal might offer defendant, obviously could not compensate for the hardships the rule was meant to alleviate but would instead compound them.

The petition for certiorari concedes that the use of mandamus here was warranted; petitioner quarreled only with the writ's terms (Pet. 2, 12, n. 2; P.B. 2, 14, 17). Nevertheless, petitioner's brief on the merits apologetically draws attention to what it terms the "unsettled and troublesome question whether the writ of mandamus is ever available to review a district court's alleged 'abuse of discretion' in ruling on a Rule 21(b) motion" (P.B. 22). Although petitioner properly suggests that he may now be barred from raising this question on its merits (Supreme Court Rule 40-1(d)(2)), he urges in his brief the untimely suggestion that the court was without power to issue a writ as tending to show what the writ's terms should have been (P.B. 22).

What petitioner really suggests is a rule that would assure the district courts that transfer decisions that flout the interest of justice—and indeed go so far as to usurp the functions of a sister court—will henceforth be unassailable. This Court has, however, carefully refrained from making blanket rules that would exempt whole categories of judi-

---

[8] See, *e.g.*, United States v. National City Lines, Inc., 7 F.R.D. 393, 402 (S.D. Cal. 1947). Indeed, Rule 2 of the Federal Rules of Criminal Procedure provides that all the criminal rules "shall be construed to secure . . . the elimination of unjustifiable expense. . . ."

cial decisions from appellate supervision and has instead insisted on the *ad hoc* exercise of the extraordinary powers bestowed by the All Writs Act. As the Court explained in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943):

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the [appellate] court. [Cases cited.] Hence the question . . . is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power."

The Seventh Circuit has demonstrated its understanding of the nature of the discretion so granted it. Recognizing that the All Writs Act provides for "extraordinary causes", it has "been slow to resort to" these writs and "unwilling to allow their use as a substitute for appeal." *Atlass* v. *Miner*, 265 F. 2d 312, 313 (7th Cir. 1959), *aff'd* 363 U.S. 641 (1960). It has refused to issue such writs to correct mere error and has emphasized that extraordinary writs are justified only on a strong showing of abuse of discretion. *A. C. Nielsen Co.* v. *Hoffman*, 270 F. 2d 693 (7th Cir. 1959); *Sypert* v. *Miner*, 266 F. 2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959).[9]

[9] Indeed, this Court has asserted that its examination of the Seventh Circuit's exercise of discretion under the All Writs Act "leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint." LaBuy v. Howes Leather Co., 352 U.S. 249, 257 (1957). An examination of the Clerk's Memorandum Book for the court of appeals shows that between January 1, 1957 (LaBuy was decided by this Court on January 14, 1957) and October 17, 1963, writs of mandamus and/or prohibition were sought in 92 instances and were granted in only eight instances, including this case.

Petitioner's new-found doubt arises from arguments in the government's brief in *Van Dusen* v. *Barrack*, No. 80, October Term 1963, involving construction of a statute, not a rule of this Court. The thrust of the government's argument in *Van Dusen* is that mandamus should not have been used where the broader remedy provided by the Interlocutory Appeals Act had not been attempted. Traditionally mandamus is available only "when no other remedy will suffice. . . ." *DiBella* v. *United States*, 369 U.S. 121, 125, n. 4 (1962). Accordingly, to the extent that situations traditionally considered appropriate for mandamus may now be open to regular and immediate review, extraordinary writs may in practice be used even more sparingly in civil cases.

But the provision for regular interlocutory review in *civil* cases cannot affect the availability of extraordinary writs in *criminal* cases where the writ is the only available remedy. The Interlocutory Appeals Act, opening as it does to immediate review a sizable number of interlocutory decisions formerly reviewable only after final judgment, hardly indicates a strengthening of the final judgment rule. Defendant does not suggest that this substantial encroachment on the final judgment rule in civil cases merits expansion of the number or character of the criminal cases in which extraordinary writs would be appropriate, but neither does it dictate their contraction. As a general rule, the public has an interest in the speedy disposition of criminal cases and, therefore, in strict application of the final judgment rule. But in the realm of the extraordinary case to which the All Writs Act applies, the appellate courts should be particu-

larly reluctant to countenance abuse affecting the procedural protections of defendants in criminal cases, "matters that touch closely the fair administration of criminal justice and public confidence in it . . ." and are among the most cherished heritages of our law and form of government. *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

Accordingly, defendant submits that it is settled that the appellate court here had the *power* to issue a writ of mandamus. Ordinarily, the question is simply "whether . . . [this] case was an appropriate one for the exercise of that power." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943). Here, however, it is the still more limited issue proposed by petitioner, whether the properly issued writ should have remanded rather than ordering transfer (P.B. 2).

II.

PETITIONER USURPED THE POWER OF A SISTER COURT WHEN, CITING FACTS TRUE OF ANY SUBSTANTIAL CORPORATE DEFENDANT IN ITS HOME DISTRICT, HE DENIED TRANSFER BECAUSE THE GOVERNMENT MIGHT NOT OBTAIN A FAIR TRIAL.

As the court of appeals found (R. 240), the "most important" factor in petitioner's denial of transfer was his determination that "it would be more difficult [for the Government of the United States] to get a fair and impartial jury in the [transferee] . . . district" (R. 227), a determination that the court of appeals held to be an improper speculation about the ability of a federal court of concurrent jurisdiction to provide a fair trial (R. 247).

Petitioner's "fair trial" ruling was particularly ironic because it was based not on facts in any way peculiar to the case but on facts that should instead have influenced him to grant the transfer motion. Petitioner candidly pointed to facts that would be true of any substantial corporation in the area of its home offices, to the unsurprising presence of "many" employees and stockholders in the area of defendant's home offices and their participation, as individuals, in civic affairs and their other "contacts" (R. 227; *supra*, pp. 12-13). The court of appeals, paraphrasing this Court's decision in *United States* v. *Johnson*, 323 U.S. 273, 276 (1944), held that the decision thus "ignored" the "underlying spirit of the constitutional concern for trial in the vicinage of the defendant . . ." (R. 243). Moreover, an essential purpose of Rule 21(b) was "to further the policy of affording defendants a right to a trial at . . . [their] home base." *United States* v. *Cashin*, 281 F.2d 669, 675 (2d Cir. 1960); *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398 (S.D. Cal. 1947). But petitioner, as his brief to this Court points out (P.B. 31), held this "constitutional policy" to be "irrelevant"; indeed, he acted in direct contravention of it when he refused transfer to defendant's home district merely because it was home.

A. Petitioner usurped the power of a sister court when he presumed to appraise or speculate on the efficacy of its operation and its ability to provide a fair trial.

The court of appeals (R. 247), including the dissenting judge (R. 252), and the petition for certiorari (Pet. 12, n. 2) agree, in accordance with the settled law, that a

district judge may not speculate as to whether another federal district court can assure a litigant a fair trial. To do so, the Court of Appeals for the District of Columbia has stated, "would be an act of unwarranted arrogance" and would amount to an assertion of "power to hear and determine the faithfulness to duty of a sister court . . . [over which] we have not the slightest semblance of authority . . ." *Johnson* v. *Mathews*, 182 F.2d 677, 681 (D.C. Cir.), *cert. denied* 340 U.S. 828 (1950); *accord, Chicago, R.I. & Pac. R.R.* v. *Igoe*, 212 F.2d 378, 382 (7th Cir. 1954); *Carbide & Carbon Chem. Corp.* v. *United States Industrial Chem., Inc.*, 140 F.2d 47, 49 (4th Cir. 1944); *Patterson* v. *Louisville & N. R.R.*, 182 F. Supp. 95, 99 (S.D. Ind. 1960); *Early & Daniel Co.* v. *Wedgefield, Inc.*, 164 F. Supp. 414, 415 (M.D.N.C. 1958).

It was just such a usurpation of power for petitioner here to give effect to his "belief of a difficulty which might be encountered in procuring unprejudiced veniremen . . . [by] a refusal to make a transfer otherwise proper under Rule 21(b)," the Seventh Circuit found, "because no court is in a position to pass upon the qualification of jurors, except by considering their *voir dire* examination" (R. 244). See *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Beck* v. *Washington*, 369 U.S. 541, 557 (1962); *Blumenfield* v. *United States*, 284 F.2d 46, 51 (8th Cir. 1960), *cert. denied* 365 U.S. 812 (1961); *United States* v. *Kline*, 205 F. Supp. 637, 640 (D. Minn. 1962). And the court noted that it had "been cited to no federal case . . . holding . . ." that "when venue exists in both . . . [forums], it is permissible for

a district court in Illinois to make a determination in the 'interest of justice' under Rule 21(b) to the effect that it would be difficult for the government to procure a fair trial in the District of Minnesota" (R. 243).[10] "It follows," the Seventh Circuit held, that "no order *in any way* based upon such reasoning can stand, even under the guise of an exercise of discretion" (R. 247).

Petitioner, in his petition and in his brief on the merits, admits that it was "impermissible to take into account the *difficulty* of assembling an unbiased jury" (Pet. 12, n. 2; P.B. 26). Indeed, petitioner has admitted that this mistake was in itself of sufficient seriousness to warrant the appellate court's issuance of the extraordinary writ of mandamus: the question petitioner actually presented to this Court in his petition and again in his brief, the only question that this Court has agreed to review, challenges the *terms* of the writ but *not its use* (Pet. 2, 12-15; P.B. 2, 17).

But in his brief petitioner for the first time suggests that he "may have been [considering only that] it might take longer and be more arduous to select a proper jury" in

---

[10] The court of appeals distinguished the cases relied upon by petitioner which involved situations in which the transfer was ordered, at the defendant's request, because *the defendant* could not obtain a fair trial *in the transferor court*. If noted, for example, that in United States v. Hoffa, 205 F. Supp. 710, 722 (S.D. Fla. 1962), cited by petitioner in support of his "fair trial" ruling (R. 227), the court "was passing upon conditions in the district of the court . . . making the transfer. It did not assume to pass upon whether a court in another judicial subdivision would or might be able to procure a fair jury or grant a fair trial." (R. 243)

Minnesota (P.B. 29).[11] The record does not support this claim.

The introduction of the "fair trial" issue at the oral argument by petitioner's own questions is detailed at pages 5-7, *supra*. His doubt that "an impartial jury" could be obtained in Minnesota because of the prevalence of defendant's "fellow sympathizers" there reveals his train of thought at its inception (R. 128). And certainly petitioner did not ignore the unequivocal arguments made to him by government counsel, summarized in this assertion: "I challenge where any court would decide that the Government can get a fair trial in Minneapolis or St. Paul" (R. 178).

In his opinion petitioner concluded that "there *might* exist a very severe influence on *any* citizen in the area called for jury service . . .," an influence that "would probably make itself felt [even] among the citizens in the counties adjacent to [those in which Minneapolis and St. Paul are located]" (R. 227). To counteract this "severe influence", the government, he noted, has "but three peremptory challenges" (R. 227). These facts, "material" to the conclusion that "it would be more difficult to get a fair and im-

[11] Defendant does not, of course, concede that this would have been a proper consideration. In any event, it is inconceivable that this kind of difficulty in selecting a jury, even assuming that it might exist, would cause any substantial delay, anything more than a matter of hours, or at most, days. We know of no case suggesting that this kind of delay, or the effort of court and counsel that might be involved in it, is of sufficient importance to warrant consideration under Rule 21(b) (still less to warrant denial of transfer under that rule), and petitioner cites none.

partial jury in . . ." Minnesota (R. 227), are incompatible with any conclusion other than that reached by the court of appeals, that petitioner "believed that there was a *likelihood* of the government not receiving a fair jury trial in Minnesota" (R. 244). Certainly, peremptory challenges have nothing to do with delay or arduousness in obtaining a jury; their limited number would indicate the opposite. Rather the reference reveals petitioner's concern that the government would not be able to purge the jury panel of people sympathetic to defendant.

The answer to the rule to show cause reasserted "that it would be more difficult for the Government to obtain an impartial jury" (R. 234-236), and petitioner made his meaning clear in a 53-page supporting brief (Brief for Petitioner [respondent below] in the Court of Appeals for the Seventh Circuit).[12] Only a belief that it was probable that any Minnesota jury would be prejudiced against the government can explain his argument that transfer should have been denied because "the Government would be without remedy upon a judgment of acquittal . . ." rendered by a biased jury in Minnesota (*id.* at 40-42). Indeed, petitioner went so far as to assert to the court of appeals that selecting "talesmen . . . from distant counties does not eliminate the problem, *for even assuming they were free of influence when called,*

[12] Only the answer to the rule to show cause has been printed. The supporting brief, which became relevant only when this issue was raised in petitioner's brief on the merits to this Court, is part of the record in this Court, certified copies having been filed with the petition for certiorari.

they would nonetheless be subject daily to the local atmosphere at the court site after selection" (*Id.* at 42, n. 9).

After the court of appeals entered its opinion, petitioner did not ask for rehearing. Instead his petition for certiorari expressly conceded the "correctness" of the court of appeals' finding and disavowed any wish to have this Court review it (Pet. 12, n. 2). Even after having decided to raise the question (one clearly barred by Supreme Court Rule 40-1(d)(2)), the brief on the merits does not assert that the Seventh Circuit did *in fact* misunderstand petitioner's position but merely that petitioner's opinion may be susceptible on its face to an interpretation less serious than the one uniformly given it even in the petition for certiorari. And this afterthought is urged as a reason for this Court to change the terms of the Seventh Circuit's writ of mandamus from the provision for immediate transfer, which the court of appeals in its discretion deemed necessary, to a provision for remand—to the end that petitioner might have another opportunity to rule on the transfer motion.

Thus the history of this issue, from the time of its introduction by petitioner at his hearing on the transfer motion to the time of his confession of abuse meriting mandamus in the petition, shows that its consideration is barred at this time and that, even if it were not, the suggestion that the court of appeals misunderstood petitioner's position on the fair trial issue is unsupportable.

B. Petitioner abused his discretion when he refused to give any weight to the "constitutional concern" that those accused of crime be tried, when possible, at home.

When the court of appeals pointed out that "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district . . ." (R. 248), it was not concerned with the problem of determining where the crime was committed because venue in the transferee forum was stipulated. The problem was not whether trial *could* be held in either forum but the derivative problem of determining where the trial *should* be held in the interest of justice.[18] It is difficult to understand, therefore, why petitioner's discussion of the "home district" question concentrates on an irrelevant discussion of defendant's constitutional right to be tried where the crime was committed. Defendant does not ask for a trial where the crime was not committed but for trial in its home district where venue admittedly lies.

Rule 21(b) was promulgated in order to withdraw what was once the government's absolute right to choose the forum in multi-venue cases and to allow courts, on

---

[18] The cases cited by petitioner on this point (P.B. 33), In re Palliser, 136 U.S. 257 (1890) and Johnston v. United States, 351 U.S. 215 (1956), are cases that deal exclusively with the question of venue, i.e., where the trial *could* be held and not with the relevant problem of where the trial *should* be held when it could be held in more than one place.

the motion of a defendant, to transfer criminal cases in accordance with "the interest of justice". Certainly the interest of justice should take into account the "policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence" (*United States* v. *Cores*, 356 U.S. 405, 410 (1958)) which has ancient origins in the common law and is, most particularly, foundational to American legal traditions.

As Mr. Justice Douglas has cogently demonstrated, the history of the constitutional provisions guaranteeing those criminally accused a right to trial where the crime was committed shows that a basic concern of the framers of the Constitution was to guarantee to each defendant a trial at home. The Declaration of Independence cited among the wrongs wrought by George III those "depriving us . . . of the benefits of Trial by Jury [and] . . . transporting us beyond the Seas to be tried . . ." and the reference was to the proposal by Parliament that Americans be tried abroad or in other American colonies for crimes committed in their own colonies, about which "the Virginia Resolves of May 16, 1769, voiced the unanimous view that 'thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away . . .'" *Johnston* v. *United States*, 351 U.S. 215, 224 (1956) (Mr. Justice Douglas dissenting), cited with approval by the Court in *United States* v. *Cores*, 356 U.S. 405, 410 (1958). A modern commentator has explained:

"[T]he term 'vicinage' as used by the colonists in their struggle with England did not refer to the neighborhood of the crime or even to the county in which the crime was alleged to have been committed. By insisting on a right to a jury of the vicinage the colonists hoped to escape the hardship and danger of standing trial in some distant colony or in England. In the Declaration of Independence the King was condemned, not for interfering with the jury of the vicinage as known to Coke, but 'for transporting us beyond Seas to be tried for pretended offences.'" (Blume, *The Place of Trial of Criminal Cases*, 43 Mich. L. Rev. 59, 65-66 (1944).)

Indeed, in his definitive work on the Constitution, Mr. Justice Story explained that, "the *object* of [the constitutional] clause [providing that the trial of all crimes is to be held where they are committed] is, to secure the party accused from being dragged to a trial in some distant state, far away from his friends, and witnesses, and neighborhood; and thus subjected to the verdict of mere strangers . . . [and possibly] to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence." 2 Story, Commentaries on the Constitution, § 1781 (4th ed. 1873).

Only in relatively modern times has it become necessary in ordinary cases to distinguish between the place of the crime and the home of the defendant. When men were less mobile and the acts subject to criminal sanction less complex, the guarantee of trial in the vicinage of the commission of the crime was generally a guarantee of trial

in the vicinage of the defendant's home. But in the years when the incidence of multi-venue crimes, based on the commerce clause and often involving charges of conspiracy, became increasingly frequent, this Court recognized the growing opportunity for abuse and oppression which resulted from allowing the prosecution an absolute right to choose the forum in multi-venue cases. In time the practice of using this "vagrant" crime of conspiracy as a basis for jurisdiction, Mr. Justice Jackson has pointed out, reduced "to a phantom" the protection that the founding fathers had intended to provide. *Krulewitch* v. *United States*, 336 U.S. 440, 452 (1949) (concurring opinion).

The Court early admonished that it did not approve "the practice of indicting citizens [in] . . . distant States . . . , where an indictment will lie in the State of the domicil of such person . . ." *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905). In his dissent in *Hyde* v. *United States*, 225 U.S. 347, 384-391 (1912), Mr. Justice Holmes argued against constructions that allowed venue in places remote from the defendant's home because they would produce the "wrongs that our forefathers meant to prevent" (225 U.S. at 387).

In *United States* v. *Johnson*, 323 U.S. 273 (1944), the Court applied the rationale of the Holmes' dissent. Refusing to construe the governing statute as allowing venue in a place far from the defendant's domicile, the Court based its decision on "the underlying spirit of the constitutional concern for trial in the vicinage" which required the avoidance of statutory constructions allowing venue "in places remote from home" (*id.* at 276, 278). "Such construction," the Court held, "while not required by the

compulsions of . . . the Constitution . . . is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes . . ." (323 U.S. at 275). The Court explained that this doctrine bars "the door to needless hardship . . . by prosecution remote from home and . . . appropriate facilities for defense," and banishes "the appearance of abuses, if not . . . abuses, in the selection of . . . a tribunal favorable to the prosecution." *Ibid.* Accordingly, "if an enactment . . . equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id.* at 276.

In the face of this long history and the continued strength and viability of this public policy as shown in the decisions of this Court, petitioner's admission that he considered it "irrelevant" that the defendant here asked for transfer to its home district (P.B. 31) demonstrates the extent and seriousness of his misunderstanding of the factors relevant to the "interest of justice" under Rule 21(b). An express and specific purpose of the Rule, heretofore respected by the decided cases,[14] was to make it possible for the federal

[14] United States v. Cashin, 281 F.2d 669, 675 (2d Cir. 1960); United States v. North Am. Van Lines, Inc., 1962 Trade Cas. ¶70,283 (D.D.C. 1962); United States v. General Motors Corp., 194 F. Supp. 754, 757 (S.D.N.Y. 1961); United States v. Olen, 183 F. Supp. 212, 215-217 (S.D.N.Y. 1960); United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880, 885 (D. Md. 1948); United States v. National City Lines, Inc., 7 F.R.D. 393, 396-398 (S.D. Cal. 1947).

courts to implement this long-standing "constitutional policy" favoring trial in the defendant's home district. Indeed, this intention complemented the "very salutary" purpose of Rule 21(b) to eliminate gross injustices formerly produced by allowing the prosecution an absolute right to choose the forum in multi-venue conspiracy cases, particularly antitrust cases. 4 BARRON, FEDERAL PRACTICE AND PROCEDURE, § 2091, p. 150 (1951); Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 452 (1944). Those abuses were described in relation to the policy favoring trial in the defendant's home district by Judge Medalie, a member of the Advisory Committee on Federal Rules of Criminal Procedure, as ". . . pretty shabby business for the great government of the United States to indulge in. . . . If, for example, a business' headquarters are in Chicago, everybody is there, every book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government. . . ." FEDERAL RULES OF CRIMINAL PROCEDURE, NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, PROCEEDINGS, 274-275 (1946).

This Court took cognizance of Rule 21(b)'s usefulness in effectuating "the policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence . . ." in *United States* v. *Cores*, 356 U.S. 405, 410 (1958). In that case the Court construed the governing statute broadly to permit venue to lie in the defendant's home district. The government justified that interpretation on the basis that in most cases arising under the statute it would result, as it did in

the *Cores* case, in the defendant's being tried in the place of his residence, thus avoiding the "hardship" involved in trial in "a distant place where he was not residing and where he and his witnesses were complete strangers."[15] The Court in its opinion expressly pointed out that its decision would in *every* case "make . . . a valuable tool of justice [Rule 21(b)] available [to the defendant] . . .", and thus open the way for transfer of the case to the home district of the accused. *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

Defendant does not argue that all who are accused of crime have an absolute right to be tried at home, nor did the Seventh Circuit so hold. But the Seventh Circuit did recognize that a purpose of Rule 21(b) is to implement the "constitutional policy" favoring trial in the home district when there is venue there and when there are no substantial reasons for having the trial elsewhere. And the Seventh Circuit was shocked, we submit rightly, by a decision that not only eschewed the policy favoring trial at home but refused transfer simply because it would result in the defendant's being tried at home.

Petitioner suggests that the appellate court viewed the policy favoring trial at home as being "so strong that it must prevail unless there are overwhelming counterbalancing factors in the particular case" (P.B. 34). The history of the policy indicates that strength. But defendant here

---

[15] Brief for the United States in United States v. Cores, Docket No. 455, October Term 1957, page 21.

does not need to place such reliance on it because, as will be shown in the succeeding section, the record here is not only devoid of "overwhelming counterbalancing factors" favoring trial in the Eastern District of Illinois, but contains virtually nothing favoring trial there.

III.

THE APPELLATE COURT'S ORDER THAT THIS CASE BE TRANSFERRED FORTHWITH WAS PROPER IN THE LIGHT OF THE RECORD FACTS.

A. It was proper, and necessary, for the court of appeals to review the whole record.

Petitioner's primary contention in this Court is that the court of appeals, having "laid bare" his abuse, was obliged, without further consideration of any aspect of his decision or of the record, to issue a writ of mandamus remanding the decision to him (P.B. 26). But the same contention was recently considered and ruled upon by the Court of Appeals for the Second Circuit in *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F. 2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962), in which the court, having concluded that a writ of mandamus was in order, considered the form that the writ should take: "we must now decide whether we should . . . limit our decision [to vacate an order insofar as it was based on an improper consideration] *or should also pass upon the other issues* . . . to the full extent the record will permit, although we might not have considered mandamus if they had stood alone."

297 F. 2d at 90. The court concluded that it could "lawfully pursue either course," but that it was preferable for it to review the entire record in order to prevent further delay, and because "we see no purpose in a [remand] . . . , when all material needed for . . . disposition is before us, and, in our view, any determination in [respondent's] favor by the District Court would ultimately have to be reversed as erroneous in law." 297 F. 2d at 90.

The problem posed to the Seventh Circuit was parallel, although, rather than being one of two equally lawful alternatives, remand here would have been a dubious solution. As mandamus is "reserved for really extraordinary causes", such as "where appeal is a clearly inadequate remedy . . ." (*Ex parte Fahey*, 332 U.S. 258, 260 (1947)), the issuance of an extraordinary writ would not have been justified if, despite the abuse, the ultimate denial of transfer was correct or at least supportable on the basis of the record as a whole. In order to be certain that the writ was necessary to correct an otherwise irremediable abuse of discretion, the court of appeals had a duty to look at the whole record.

Furthermore, this was not a situation like the one considered in, for example, the first *Igoe* case (*Chicago, R.I. & Pac. R. R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954)), upon which petitioner relies (P.B. 30), a case in which the trial court's decision rested solely on consideration of the improper factor and the relevant factors had not been considered at all. Here, on petitioner's initiative, the entire record was urged to the court of appeals as justification for a decision involving error so serious as to constitute abuse of discretion. Indeed, petitioner argued that the record apart

from the "fair trial" factor did support his denial of transfer.[16]

Instead, the law applicable here is found in the second *Igoe* case, decided after the district judge, on remand, again denied the motion, this time on the basis of the record as a whole. The court of appeals then examined the record and found that the case was brought in a district which had "no relation to the litigation . . .", whereas "the balance of convenience of the parties" was "so overwhelmingly in favor of the defendant that . . . the denial . . . of the motion to transfer . . . amounted to an abuse of discretion." *Chicago, R. I. & Pac. R. R.* v. *Igoe*, 220 F. 2d 299, 304, 305 (7th Cir.), *cert. denied* 350 U.S. 822 (1955). Accordingly, the court by mandamus directed the district judge to transfer the action. As to the statement in its earlier decision quoted at P.B. 30, the court explained, "all we intended to say was that the District Court must, *initially*, make the decision *by applying the statutory tests* . . ." 220 F. 2d at

---

[16] Extraordinary writs are to be used to accomplish the ends of justice, not to impose empty procedural routine, and any court evaluating realistically the arguments petitioner made to the Seventh Circuit would realize that remand in this case would be tantamount to denial of transfer. Petitioner argued that, irrespective of the fair trial issue, "once the trial court determined that defendant would obtain a fair trial in the Eastern District of Illinois and concluded that defendant had not established that trial in that district would subject it to such serious inconvenience and disruption of business so as to require transfer in the 'interest of justice'. . . , it could, without more, refuse to transfer the cause." Brief for Petitioner [respondent below] in the Court of Appeals for the Seventh Circuit, page 42. His petition for certiorari states that "there is every indication that even had petitioner altogether excluded . . . the 'impartial jury' point, he would still have denied transfer" (Pet. 13).

302. "We thought we clearly delineated the scope of our [earlier] decision," the court added, "when we stated: 'However, this opinion deals with the existence of power [to issue the writ] only, not with the permissible limitations on its exercise.'" *Ibid.*

United States v. *Johnson*, 327 U.S. 106 (1946), on which petitioner relies, is not in point. The denial of a new trial in that case, which was appealed in the ordinary and regular way, presented a pure question of fact: did the witness Goldstein lie? Credibility questions, especially where as in *Johnson* the demeanor of witnesses is taken into consideration, are always reserved to the trial court. But this case involves a completely documentary record, one which petitioner would have no special advantage in evaluating even if it involved conflicting facts. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). Here the basic facts are admitted or uncontradicted, and the appellate court did not reject any finding of fact made by petitioner—saving only the finding that the government could not obtain a fair trial in Minnesota. In any case the "effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941); see also *Exmoor Country Club* v. *United States*, 119 F. 2d 961, 963 (7th Cir. 1941). Their evaluation under Rule 21(b) involves only the application of legal standards to determine the purely legal question of the interest of justice.

But even if we were to assume that the *Johnson* case was relevant here, it is difficult to see how it would justify remand prior to examination of the record. *Johnson* certainly

authorizes reversal of even the simplest fact finding if it is unsupported, but it is impossible to tell whether it is unsupported without looking at the record. Indeed, petitioner concedes that the appellate court's action here was correct if "it is clear that without considering the improper factor the district court would have no alternative but to transfer" (P. B. 34). This could be determined only by looking at the record.

B. The record so overwhelmingly shows that transfer will be in the interest of justice as to compel transfer under Rule 21(b) as a matter of law.

When the court of appeals examined the documents which comprise the record in this case, it found no reason for holding the trial in Danville. On the contrary, the court found that "without considering the improper factor the district court would have no alternative but to transfer" (P.B. 34), for its study of the record revealed a "demonstration *by proof or admission* of the essential elements of convenience, expense and early trial" constituting the interest of justice which compels transfer under Criminal Rule 21(b) (see p. 16, *supra*). Thus the court of appeals' conclusion is not a set of *de novo* findings of fact, as petitioner's brief argues, but a conclusion of law based on an uncontroverted record.

So far as the record shows, the events put in issue by the indictment did not take place in the Eastern District of Illinois, and there is no dispute that venue, when and if it is laid, will be technical (see pp. 12, n. 4, 13, *supra*). Not only does the documentary record fail to detail events tying

the case to the Danville district, but the government attorneys, although they used the hearings as an opportunity to outline their entire case on the merits to petitioner, did not allege that any event that would tend to prove the essential elements of the crimes charged in the indictment took place in the Eastern District of Illinois. So tenuous were their suggested bases for venue (see p. 12, n. 4, *supra*) that petitioner felt compelled to take cognizance of the questionable status of the government's ability to establish venue in his district by observing that "defendant would not suffer if the Government should fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (R. 223).

The record shows (*supra*, pp. 11-12), moreover, that neither defendant nor any named co-conspirator or known witness on the merits is to be found in the Eastern District of Illinois, nor are counsel (except for defendant's local counsel whose services would be obviated by transfer) located there. The documents the government has sent there, which so far as the record shows form Danville's only material link with this case, have already done considerable traveling and, packed as they are in nine ordinary-sized file boxes, can be removed to Minnesota at a cost of less than $50 (R. 73). See *United States* v. *Olen*, 183 F. Supp. 212, 219-220 (S.D.N.Y. 1960).

On the other hand, the record shows the District of Minnesota, the proposed transferee forum, to be the place where in all probability the events that will be determinative of the issues involved in the indictment really took place (pp. 8-9, *supra*). It is the center of defendant's operations,

the place where its research is done, its policies formed, its records kept, its many key personnel and its general and patent counsel located, and many of the witnesses defendant will call live and work there (p. 8, *supra*). The record shows beyond cavil the markedly greater convenience of the St. Paul-Minneapolis area to all witnesses—those named as co-conspirators, the witnesses defendant intends to call, and the grand jury witnesses who, presumably, will form the nucleus of the government's witnesses at the trial (see p. 10, *supra*).

The indictment, culminating an investigation that continued over a period of seventeen years (R. 42, 138), puts in issue virtually every facet of the development and sale of three major products. It is undisputed that the trial of these factually and legally complicated issues will necessitate a tremendous commitment by defendant of time, personnel, and money; trying the case in Danville, rather than in one of the Twin Cities, will increase its dollar cost to defendant by at least $100,000 (R. 75). Involving as it does those who have determined defendant's policies and have carried them out over a thirty-year period, the trial itself, as the undisputed record facts here show, will "require the attendance over a period of months of [many of defendant's] . . . key men . . ." and, if held in Danville, "would result in a complete dislocation of its business at the place where it can least afford it—*at the central place of control.*" *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 400 (S.D. Cal. 1947); see pp. 9-10, *supra*.

If ever there was a case that illustrated the basic reason for the adoption of Rule 21(b) (see pp. 39-40, *supra*), the record here presents it. Multi-venue antitrust conspiracy cases brought, for whatever reason, in forums with which they have no real connection motivated the drafting of Rule 21(b). See, *e.g.*, FEDERAL RULES OF CRIMINAL PROCEDURE, NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, PROCEEDINGS, pp. 168-170, 224-225, 274-275 (1946). Judge Medalie pointed out that "if . . . the crime has been . . . claimed to have been committed in more than one district," Rule 21(b) makes it possible—indeed mandatory—that "the judge in the [transferor] district . . . order . . . the trial in the district *where it is most convenient* that the case be tried. If for example"—and in this illustration we substitute "St. Paul" for Judge Medalie's hypothetical "Chicago"—"a business' headquarters are in [St. Paul], everybody is there, every book and record is there, practically every witness is there on both sides, then try it in [St. Paul]."

Particularly should the purpose of the rule be respected in a case of this magnitude where quick and convenient access to the client's many interested officers and employees, and to the voluminous records that are or may become relevant, has an importance to the quality of the defense that cannot be overestimated. As Judge Tehan pointed out in the *American Natural Gas* case: "No one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic

and not recognize the need and value of close contact between clients, officers of corporations, and records, and attorneys immediately prior to and during the course of the trial." *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶ 69,265 at p. 75,034 (E.D. Wis. 1959); see also *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D.N.Y. 1961). It is clear on this record that trial in Danville "would impose unnecessary hardships . . . and entail unjustifiable expense which it is the object of . . . [Rule 21(b)] . . . to avoid." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 402 (S.D. Cal. 1947).

The one-page summary (P.B. 6-7) of the government's bases for opposing the transfer motion reveals three completely unsubstantiated assertions: (1) that Danville was a more convenient forum than St. Paul for an undisclosed number of unidentified government witnesses; (2) that defendant is not only guilty but continues to engage in illegal activity and therefore must be speedily tried in Danville; and (3) that the serious hardship that trial in Danville will impose on defendant need not be considered because defendant has in the past demonstrated its ability to participate in less complicated civil litigation away from home and, more important, because defendant's income and assets are substantial enough to foreclose the possibility that the added cost of an adequate defense in Danville will result in bankruptcy. That petitioner treated these contentions seriously, while admittedly refusing to take "at face value" (R. 237) the carefully documented facts on which defendant based its showing that justice would be served

by transfer, is a measure of the extent of the abuse perpetrated in petitioner's denial of transfer.

(1) In answer to defendant's detailed accounting of every known witness, government counsel merely averred that "a 'substantial number' of the government's prospective witnesses live within a 300-mile radius of Danville, while only one or two minor witnesses live within 300 miles of St. Paul-Minneapolis" (P.B. 7). The arbitrary selection of a 300-mile radius brings Chicago, where two named co-conspirators and six probable witnesses are located (R. 77), into the proposed Danville area but leaves it out of the Twin Cities area. Thus the government's assertion reveals that it has no witnesses in the Eastern District of Illinois and supports the inference that it has no substantial number of witnesses closer to Danville than Chicago. Moreover, it is beyond dispute that it is easier to get to St. Paul than to Danville from Chicago, even though the distance in miles is somewhat greater (R. 78-79, 82-85; see p. 10, *supra*).

The legal effect of petitioner's determination, which allowed this bare assertion to outweigh defendant's detailed evidence, is to impose upon a defendant seeking transfer an insurmountable burden of proof. The government may resist pretrial discovery in a criminal case, but the consequence of using that right as an excuse for failure to disclose facts material and necessary to rebut an overwhelming contrary showing under Rule 21(b) can and should be the granting of the transfer motion. *Cf. United States v. Gerber*, 86 F. Supp. 175, 178 (E.D. Pa. 1949).

(2) While relative docket conditions may be pertinent to a transfer motion when one docket is congested and the other not, they are not so when, as here, the dockets in both courts are current—especially when the record otherwise overwhelmingly favors one forum over the other (R. 248, 48; see pp. 10-11, *supra*). There was no factual disagreement between the district and appellate courts on this point. Certainly an appellate court, with its broader administrative and supervisory experience, can evaluate the comparative status of the dockets in the two forums. The decision of the court of appeals shows, moreover, its disapproval of the special handling of the case which petitioner clearly proposed (see p. 15, *supra*),[17] and its approval of the average case load statistics as the significant ones (see pp. 10-11, 11, n. 3, *supra*). Furthermore, petitioner's concern that the case be tried immediately, based as it was on government counsel's completely unsubstantiated "avowal" of continuing guilt (R. 236), denied defendant the fundamental presumption of its innocence. See *United States* v. *White*, 95 F. Supp. 544, 548 (D. Neb. 1951).

(3) The emphasis in petitioner's opinion on defendant's ability to undertake the hardship that a Danville trial would impose stems from his initial error, consideration of the "fair trial" issue as determinative. He discussed the re-

[17] Petitioner's assertion in his answer to the rule to show cause that transfer would delay the trial of this case for a year (R. 236) can only mean that this case, taking its normal place on a current docket, would not come to trial for a year (R. 99)—whereas petitioner would have tried the factually voluminous and legally complex issues created by the indictment immediately (R. 226).

mainder of the record in terms of *justifying* the decision made on other grounds (R. 221-226, 235-237; see pp. 13-14, *supra*); his attempt was to demonstrate that defendant *could* be adequately represented in Danville rather than that the trial *should* be held there in the interest of justice. The essential reason for petitioner's conclusion that an adequate defense was *physically possible* in Danville was, as the government argued, that "in view of the defendant's . . . gross sales . . . and earnings . . . there was no danger that the added expense of trial in Danville would impair the quality of the defense" (P.B. 7). But the interest of justice under Rule 21(b) does not incorporate a dual standard which would make it unavailable to defendant, for it applies:

> ". . . whether the defendant be poor or rich, a small or large corporation. Neither the rules nor our system would justify the elimination of any of these elements merely because the defendants, or some of them, may be persons of great wealth or corporations with large resources." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398 (S.D. Cal. 1947).

CONCLUSION

For the reasons stated, defendant respectfully requests that the decision of the court of appeals be affirmed.

Respectfully submitted,

JOHN T. CHADWELL
GLENN W. MCGEE
JEAN ENGSTROM
ALLAN J. RENICHE
135 South La Salle Street
Chicago 3, Illinois

JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota

ROBERT Z. HICKMAN
First National Bank Building
Danville, Illinois

Attorneys for Respondent

Of Counsel:
CHADWELL, KECK, KAYSER, RUGGLES & MCLAREN
135 South La Salle Street
Chicago 3, Illinois